Supreme Court, U.S.
FILED
MAR 17 1992
OFFICE OF THE CLERK

No. ~~91~~ 92-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOEL M. BERGER,

Petitioner,

vs.

BOARD OF REGENTS OF THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF EDUCATION, and THOMAS SOBOL, as Commissioner of Education of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF IN OPPOSITION

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 416-8080

JERRY BOONE
Solicitor General

KATHRYN MONTGOMERY SMITH*
Assistant Attorney General
Of Counsel

*Counsel of Record

QUESTION PRESENTED

Was petitioner afforded due process when he received adequate notice of the charges which included, *inter alia*, practicing dentistry beyond its authorized scope, and when it was uncontroverted at the hearing on those charges that petitioner failed to seek medical intervention before treating the complainant for mercury toxicity and that finding was a basis for respondents' subsequent determination of guilt of professional misconduct which petitioner had a full and fair opportunity to rebut, but did not?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	2
A. Statement of Facts	2
B. The Administrative Proceedings	2
C. The Decisions Below	3
REASONS FOR DENYING THE WRIT	4
CONCLUSION	7

TABLE OF AUTHORITIES

Cases:	Page
In Re Ruffalo, 390 U.S. 544 (1986)	5
Mathews v. Eldridge, 424 U.S. 319 (1975)	4
Matter of Block v. Ambach, 73 N.Y.2d 323 (1989)	4
Statute:	
N.Y. Educ. Law § 6510-a(4)	3

No. 91-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOEL M. BERGER,

Petitioner,

vs.

BOARD OF REGENTS OF THE STATE OF NEW YORK, NEW YORK STATE DEPARTMENT OF EDUCATION, and THOMAS SOBOL, as Commissioner of Education of the State of New York,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, THIRD DEPARTMENT

BRIEF IN OPPOSITION

INTRODUCTION

Respondents Board of Regents of the State of New York, New York State Department of Education and Thomas Sobol, Commissioner of Education ("respondents") respectfully submit this brief in opposition to the petition for certiorari. The petition should be denied because the petition does not present a conflict with the decisions of this Court, or a conflict among courts of other states or the courts of appeals and does not raise an important federal question which should be settled by this Court.

STATEMENT OF THE CASE

A. Statement of Facts

Petitioner, a practicing dentist, appeared on television and radio programs espousing his views as to the alleged harmful effects of mercury amalgam fillings. In April of 1984, a patient visited petitioner's dental office after learning about petitioner through the media. The patient related to petitioner that she had a nineteen year history of a wide variety of medical problems, including shortness of breath, arthritis, numbness, tachycardia, tingling, depression, fatigue and pain in her arms and legs. The patient did not complain of a dental problem.

Petitioner performed a test for mercury vapor in the patient's mouth and told her that the mercury content of her mouth and fillings was normal, but that mercury was toxic in even smaller amounts and that removing her amalgam fillings could make her feel better in one to six months. Without prior consultation with the patient's medical doctor or any other physician, petitioner removed the patient's amalgam fillings as a cure for her medical ailments. The patient's subsequent complaint to the Department of Education led to the disciplinary proceeding at issue here.

B. The Administrative Proceedings

In administrative proceedings initiated by the Office of Professional Discipline ("OPD"), petitioner was charged with and found guilty by an OPD hearing panel of nine specifications of professional misconduct, including: practicing the profession of dentistry fraudulently, practicing the profession of dentistry beyond its authorized scope, gross negligence, gross incompetence, negligence on more than one occasion, incompetence on more than one occasion, and unprofessional conduct under the Board of Regents' rules, including exercising undue influence on the patient. The panel noted that it took a serious view of petitioner's misconduct, including his representations that removal of the patient's fillings would alleviate her

arm and leg pain, which it found would improperly lead patients to believe that he could cure their ills. The panel also found that petitioner's "testing was beyond the scope of [his] practice. . ." (A.18).[1] The hearing panel thus recommended that petitioner's license to practice as a dentist in New York be revoked.

The Regents Review Committee ("RRC") unanimously recommended that the findings and determination of the hearing panel be accepted, and cited as the basis for its recommendation the fact that petitioner was treating a medical problem without proper medical intervention prior to any dental procedure being performed on the patient (A.15). The RRC specifically declined to pass upon the medical issue of whether, in general, fillings containing mercury are harmful to the human body and should be removed. The RRC recommended that the measure of discipline be modified - that petitioner's dental license be suspended for two years.

The Board of Regents accepted the recommendations of the RRC as to the findings and determination of the hearing panel, but reinstated the hearing panel's recommendation and revoked petitioner's license.

C. The Decisions Below

Petitioner sought direct review of the administrative determination pursuant to Educ. Law § 6510-a(4). The Appellate Division annulled a finding of guilt as to one specification (undue influence) and unanimously confirmed, as modified, respondent's determination that all of the other specifications were supported by substantial evidence. Although the court annulled one specification, it did not disturb the penalty imposed, because petitioner's license had been revoked as to each specification upon which he had been found guilty.

---

[1] Numerals in parentheses preceded by "A" refer to pages in the Appendix to the Petition.

The New York Court of Appeals dismissed, *sua sponte*, petitioner's appeal on the ground that "no substantial constitutional question is directly involved" (A.1). The court subsequently denied petitioner's motions for rehearing and leave to appeal (A.3, 4).

REASONS FOR DENYING THE WRIT

Petitioner contends that in upholding the revocation of his license, the Appellate Division "departed from the fundamental safeguard of giving fair notice . . . of the charges against him, in a serious departure from this Court's precedent under the fair - notice component of the Due Process Clause, and in variance with the results reached in numerous state and federal courts. . . ." Pet. at 13. Therefore he asks this Court to provide "guidance" on the issue to ensure uniformity in administrative disciplinary proceedings. *Id.* There can be no serious dispute, however, that where, as here, petitioner was provided notice of the charges - which did not change either during or after the hearing in which he had a full and fair opportunity to rebut the charges - the requirements of due process were satisfied. *Mathews v. Eldridge*, 424 U.S. 319 (1975); *Matter of Block v. Ambach*, 73 N.Y.2d 323 (1989). In rejecting petitioner's due process claim, the New York courts thus simply applied well-established principles.

Petitioner's claim that his due process right was implicated here is based upon his erroneous contention that a new charge was added after the hearing when the RRC stated that petitioner failed to seek medical intervention before removing the patient's amalgam fillings. This claim is belied by the record. Petitioner was expressly charged with, *inter alia*, "practicing dentistry beyond its authorized scope." Petitioner's failure to seek medical intervention before he treated the patient was clearly a factor to be considered in finding that he practiced dentistry beyond its authorized scope. As the Appellate Division noted in rejecting petitioner's claim:

> The failure to obtain prior medical approval before removal of the amalgam fillings was not a new charge

> of misconduct. It was merely the factual basis behind the charge including that of practicing beyond the profession discussed during the hearing. Each of the expert witnesses addressed the need for the participation of a physician in the diagnosis and treatment of mercury-related problems. Contrary to petitioner's assertions, he had adequate notice of the medical intervention issue during the hearing (A.8).

Failure to seek medical intervention was thus not an independent new charge for which new notice was required to satisfy due process.

Petitioner's reliance on this Court's decision in *In Re Ruffalo*, 390 U.S. 544 (1986) is misplaced. There the Court held that the notice was inadequate because a new charge *was* added on the third day of the administrative proceeding based upon the prior days testimony. As already noted above, no new charge was added in this case and the decision of the Appellate Division is consistent with decisions of this Court that petitioner was afforded all of his due process rights.

Similarly meritless, is petitioner's claim that he was not afforded adequate notice of the factual basis of the charge. (Pet. at 14). Respondents' expert testified that petitioner should have sought medical intervention for the patient's medical problems before treating her. Petitioner was thus fully aware of the factual basis of the charge. Petitioner had the opportunity at the hearing to refute or rebut this testimony, but instead, his own expert concurred with respondents' expert, expressly stressing the importance of a physician's input in dealing with mercury related problems and further testifying that if the medical history record showed that a patient was not under a physician's care, some kind of medical care or input from a physician would certainly be warranted before removing fillings.

Contrary to petitioner's contention, there is also no conflict with decisions of other state courts or courts of appeals on the existence of a due process right to adequate notice of charges. The cases cited by petitioner merely support the proposition that

adequate notice is a requirement of due process (Pet. at 20-21). Because petitioner was afforded notice of the charges and an opportunity to be heard, the decision of the Appellate Division, rejecting his due process claim, is consistent with decisions of other state and federal courts, and there is no need for this Court to restate, clarify, provide guidance or resolve any conflict based on New York's decision in this case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
March 15, 1993

Respectfully submitted,

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
120 Broadway
New York, New York 10271
(212) 416-8080

JERRY BOONE
Solicitor General

KATHRYN MONTGOMERY SMITH*
Assistant Attorney General
of Counsel

*Counsel of Record